PUBLICATION UPDATE

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California Damages: Law and Proof

Publication 80230 Release 18 August 2014

HIGHLIGHTS

- **2014 Update for Legislation, Court Rules, and Recent Judicial Decisions**
- The entire publication has been updated for 2013 legislation and court rules, as well as recent California and federal judicial decisions. For a more detailed summary of the important changes incorporated into the publication in this release, see below.

This release is the 2014 annual update for CALIFORNIA DAMAGES—LAW AND PRACTICE. This release adds coverage 2013 legislation and rules changes, as well as recent state and federal cases dealing with damages issues. Here are some of the developments covered in this release:

Personal Injuries

In *Boeken v. Philip Morris USA Inc.* (2013) 217 Cal. App. 4th 992, 159 Cal. Rptr. 3d 195, the court held that prejudgment interest was not available when a Code Civ. Proc. § 998 offer failed to include a provision allowing the defendant to accept the offer by signing a statement that the offer was accepted. The language in Code Civ. Proc. § 998 providing that such an acceptance provision "shall" be included is mandatory, not directive. Because plaintiff's Code Civ. Proc. § 998 offer did not include the required acceptance provision, the offer was invalid.

In *Whatley-Miller v. Cooper* (2013) 212 Cal. App. 4th 1103, 151 Cal. Rptr. 3d 517 and *Aguilar v. Gostischef* (2013) 220 Cal. App. 4th 475, 163 Cal. Rptr. 3d 187, the courts held that in order for prejudgment interest to be available to plaintiff, his/her Code Civ. Proc. § 998 offer must have been made in good faith to be valid. As two appellate courts have recently summarized, good faith requires that the pretrial offer of settlement be realistically reasonable under the circumstances of the particular case. The offer must carry with it some reasonable prospect of acceptance. Whether the offer is reasonable depends upon the information available to the parties as of the date the offer was served. Reasonableness generally is measured, first, by determining

whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant, and if an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable. If the offer is found reasonable by the first test, it must then satisfy a second test: whether plaintiff's information was known or reasonably should have been known to defendant. This second test is necessary because the Section 998 mechanism works only when the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer.

Under Health & Safety Code § 1797.197a, any person described therein—which includes prehospital emergency medical care persons or lay rescuers who meet specified criteria—who administers an epinephrine auto-injector, in good faith and not for compensation, to another person who appears to be experiencing anaphylaxis at the scene of an emergency situation is not liable for any civil damages resulting from his or her acts or omissions in administering the auto-injector, if that person has complied with the requirements and standards of Health & Safety Code § 1797.197a, although this immunity does not apply to gross negligence or willful or wanton misconduct.

In *Los Defensores, Inc. v. Gomez* (2014) 223 Cal. App. 4th 377, 166 Cal. Rptr. 3d 899, the court acknowledged the difference of opinion between *Ely v. Gray* (1990) 224 Cal. App. 3d 1257, 1261–1262, 274 Cal. Rptr. 536, and *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal. App. 4th 1157, 90 Cal. Rptr. 2d 899, regarding whether a statement of damages equivalent to that required by Code Civ. Proc. § 425.11 may be necessary in an action for an accounting even though there is no statutory requirement for such a statement, but concluded that it was unnecessary to resolve the matter because the default judgment entered by the trial court was proper under both *Ely* and *Cassel*. The court found that the requirement stated in *Ely* for a pre-default notice akin to that specified in Code Civ. Proc. § 425.11 was satisfied by plaintiffs' motion for discovery sanctions (filed 27 days before the trial court ordered the entry of a default judgment), which contained plaintiff's estimate of the amount of wrongful profits that defendants had received.

Evidence of the full amount billed for a plaintiff's medical care is not relevant to the determination of a plaintiff's damages for past medical expenses, and therefore is inadmissible for that purpose if the plaintiff's medical providers, by prior agreement, had contracted to accept a lesser amount as full payment for the services provided (*Corenbaum v. Lampkin* (2013) 215 Cal. App. 4th 1308, 1328, 156 Cal. Rptr. 3d 347).

As noted in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541, 560–562, 564, 129 Cal. Rptr. 3d 325, 257 P.3d 1130), the full amount billed is not an accurate measure of the value of medical services; there can be significant disparities between the amounts charged by medical providers and the costs of providing services; the price of a particular service can vary tremendously from hospital to hospital; and a medical care provider's billed price for particular services is not necessarily representative of either the cost of providing those services or their market

value. These and other observations in *Howell* compelled the Second District Court of Appeal to the conclusion that the full amount billed for past medical services is not relevant to a determination of the reasonable value of future medical services and is inadmissible for that purpose. Further, evidence of the full amount billed for past medical services provided to plaintiffs cannot support an expert opinion on the reasonable value of future medical services (*Corenbaum v. Lampkin* (2013) 215 Cal. App. 4th 1308, 1330–1331, 156 Cal. Rptr. 3d 347).

A party asserting a right to interpleaded funds under Civ. Code § 3045.1 et seq. has the burden to prove by a preponderance of the evidence the amount of its lien, i.e., the amount of the reasonable and necessary charges for the emergency and ongoing medical or other services it furnished. A provider failed to meet this burden when it introduced no evidence that its billed charges were reasonable or were for necessary treatment attributable to a motor vehicle collision (*State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal. App. 4th 1463, 157 Cal. Rptr. 3d 863).

Under Civ. Code § 3283, a plaintiff was not precluded from showing all damages from an automobile accident simply because he failed to designate a medical expert; to recover future economic and non-economic damages, the plaintiff would simply have to show that he was reasonably certain to suffer such damages in the future, which he could do through his own testimony or otherwise (*Weaver v. United States Dep't of Agric.* (E.D. Cal. Jan. 11, 2013) 2013 U.S. Dist. LEXIS 4707).

For an expert to base an opinion as to the reasonable value of future medical services, in whole or in part, on the full amount billed for past medical services provided to a plaintiff, would lead to the introduction of evidence concerning the circumstances by which a lower price was negotiated with that plaintiff's health insurer, thus violating the evidentiary aspect of the collateral source rule. An expert who testifies with respect to the reasonable value of the future medical services a plaintiff is reasonably likely to require may not rely on the full amounts billed for the plaintiff's past medical expenses (*Corenbaum v. Lampkin* (2013) 215 Cal. App. 4th 1308, 1332, 156 Cal. Rptr. 3d 347).

Proof of Nature, Extent, and Cause of Injuries

Evidence of the full amount billed for past medical services provided to plaintiffs cannot support an expert opinion on the reasonable value of future medical services (*Corenbaum v. Lampkin* (2013) 215 Cal. App. 4th 1308, 1330–1331, 156 Cal. Rptr. 3d 347).

Wrongful Death and Survival Actions

Code Civ. Proc. § 377.60 contemplates a subjective standard that focuses on the alleged putative spouse's state of mind to determine whether he or she maintained a genuine and honest belief in the validity of the marriage. Good faith must be judged on a case-by-case basis in light of all the relevant facts, such as the efforts made to create a valid marriage, the alleged putative spouse's background and experience, and the circumstances surrounding the marriage, including any objective evidence of the marriage's invalidity. In determining good faith, the trial court must consider the totality of the circumstances, including the efforts made to create a valid marriage, the alleged putative spouse's personal background and experience, and all the circumstances surrounding the marriage. Although the claimed belief need not pass a

reasonable person test, the reasonableness or unreasonableness of one's belief in the face of objective circumstances pointing to a marriage's invalidity is a factor properly considered as part of the totality of the circumstances in determining whether the belief was genuinely and honestly held (*Ceja v. Rudolph & Sletten, Inc.* (2013) 56 Cal. 4th 1113, 158 Cal. Rptr. 3d 21, 302 P.3d 211).

In *Boeken v. Philip Morris USA Inc.* (2013) 217 Cal. App. 4th 992, 159 Cal. Rptr. 3d 195, Philip Morris contended that when a personal injury plaintiff who brought an action in which he was fully compensated for his injuries and resulting physical incapacity died from those injuries, his son's damages in a subsequent wrongful death action—in this case, loss of consortium damages—are based on the decedent's postinjury diminished condition at the time of death. Philip Morris argued that the application of such a rule would, in effect, prohibit any recovery to the son—presumably on the theory that the father, due to his lung cancer, was unable to provide the son any comfort, society, or protection at the time of the father's death. The court rejected this contention, noting that according to Philip Morris, had the father lived without lung cancer, but been killed instantly by some other tortious means, the son would have been entitled to recover against the tortfeasor; but because the father died a long, agonizing death caused by Philip Morris, the son was entitled to no recovery. In rejecting Philip Morris' argument, the court found that California Supreme Court precedent could not have intended such an absurd result.

Property Damage

The standard of proof for lost profit damages is reasonable certainty, not absolute certainty. There is no rule prohibiting recovery of lost profits damages simply because regulatory approval is a prerequisite to selling a product. It is for the jury to determine the probabilities as to whether damages are reasonably certain to occur in any particular case (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal. App. 4th 945, 971–972, 166 Cal. Rptr. 3d 134).

An appellate court reviews a lost profits award for substantial evidence. While lost profits can be established with the aid of expert testimony, economic and financial data, market surveys and analysis, business records of similar enterprises, and the like, the underlying requirement for each is a substantial similarity between the facts forming the basis of the profit projections and the business opportunity that was destroyed (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal. App. 4th 945, 970, 166 Cal. Rptr. 3d 134).

In *Ventura Kester, LLC v. Folksamerica Reinsurance Co.* (2013) 219 Cal. App. 4th 633, 161 Cal. Rptr. 3d 875, plaintiff insured contended that its insurance policy covers lost rents during the time required to repair property damage, regardless of whether there was an existing tenant. The insurer contended that the policy covers lost rent only if the insured had a tenant in place. The appellate court concluded the lost rents provision is ambiguous, and the policyholder would have a reasonable expectation of coverage for rents that were actually lost as a result of the property damage.

Conversion or Wrongful Detention of Personal Property

Available remedies for conversion include damages based on the value of the property (*Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal. App. 4th 199, 206, 168 Cal. Rptr. 3d 204).

Fraud and Deceit

A party alleging that he or she was fraudulently induced to enter into a contract

may either rescind the contract, offer to restore any benefits received, and seek restitution or retain the benefits of the contract and seek damages for fraud. A rescission requires prompt notice to the other party to the contract and an offer to restore any consideration received (Civ. Code § 1691; *Chapman v. Skype Inc.* (2013) 220 Cal. App. 4th 217, 234, 162 Cal. Rptr. 3d 864).

In California, in the absence of a fiduciary relationship, recovery for the tort of fraud is limited to the actual, out-of-pocket damages suffered by the plaintiff. The California Legislature codified this limitation in Civ. Code § 3343, which provides that the victim of fraud in the sale, purchase or exchange of property may recover only out-of-pocket losses plus certain additional damages; benefit-of-the-bargain damages may not be awarded. Thus, plaintiff could not recover on a fraud claim against a company because (1) he was limited by statute to out-of-pocket damages and could not recover the benefit-of-the-bargain damages he sought, and (2) he could not show out-of-pocket damages (*Cornerstone Staffing Solutions, Inc. v. James* (N.D. Cal. Mar. 7, 2014) 2014 U.S. Dist. LEXIS 29954).

The CLRA includes a prefiling notice requirement on actions seeking damages. At least 30 days before filing a claim for damages under the CLRA, the consumer must notify the prospective defendant of the alleged violations of the CLRA and demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation (Civ. Code § 1782(a)(2)). If, within this 30-day period, the prospective defendant corrects the alleged wrongs, or indicates that it will make such corrections within a reasonable time, no cause of action for damages will lie (*Lafferty v. Wells Fargo Bank* (2013) 213 Cal. App. 4th 545, 565, 153 Cal. Rptr. 3d 240).

The tort of unfair competition involves the act of passing off one's goods as those of another. That tort developed as an equitable remedy against the wrongful exploitation of trade names and common law trademarks that were not otherwise entitled to legal protection. Injunctive relief and damages are available for common law unfair competition involving fraud or an intent to mislead consumers (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal. App. 4th 377, 393, 166 Cal. Rptr. 3d 899).

Defamation (Libel and Slander)

When a libelous statement is defamatory on its face, it is said to be libelous per se, and actionable without proof of special damage. But if it is defamation per quod; *i.e.*, if the defamatory character is not apparent on its face and requires an explanation of the surrounding circumstances (the innuendo) to make its meaning clear, it is not libelous per se, and is not actionable without pleading and proof of special damages. Certain slanderous statements are considered slanderous *per se*, and actionable without proof of special damage. However, the slander statute expressly limits slander per se to four categories of defamatory statements, including statements charging the commission of crime, or tending directly to injure a plaintiff in respect to the plaintiff's profession, trade, or business by imputing something with reference to the plaintiff's profession, trade, or business that has a natural tendency to lessen its profits. While libel per se is not so limited, courts have held the foregoing categories of defamatory statements to also constitute libel per se (Burrill v. Nair (2013) 217 Cal. App. 4th 357, 382–383, 158 Cal. Rptr. 3d 332).

To show actual malice for purposes of

punitive damages in a defamation case, a plaintiff must demonstrate that the defendant either knew the statement was false or subjectively entertained serious doubt the statement was truthful. The question is not whether a reasonably prudent person would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice. A failure to investigate, anger and hostility toward the plaintiff, reliance upon sources known to be unreliable, or known to be biased against the plaintiff—such factors may, in an appropriate case, indicate that the publisher himself or herself had serious doubts regarding the truth of the publication (*Sanders v. Walsh* (2013) 219 Cal. App. 4th 855, 873. 162 Cal. Rptr. 3d 188).

Disparagement of Title (Slander of Title and Trade Libel)

In *Sacramento Sikh Society Bradshaw Temple v. Tatla* (2013) 219 Cal. App. 4th 1224, 162 Cal. Rptr. 3d 609, the court affirmed an award of $359,021 compensatory damages and punitive damages ranging from $60,000 to $167,000 against each of nine defendants affirmed.

Invasion of Privacy

The plain language of Civ. Code § 3344.1 indicates that it always applied to celebrities who had died prior to the enactment of the statute. It always recognized a deceased personality's right to control the commercial usage of his or her name, voice, signature, photograph, or likeness, and defined a deceased personality as any person who died within 50 or 70 years prior to January 1, 1985. Although a 2008 amendment to the statute added a provision that expressly made the rights recognized by the section retroactive to include those deceased personalities who died before January 1, 1985, the plain meaning of this phrase read in light of the entire statute (including the statute's stated application to celebrities who died prior to 1985), can only be interpreted to mean that such rights were previously implicitly retroactive. In addition, the Legislature explicitly stated that it was clarifying Civ. Code § 3344.1 by the 2008 amendment (*Crosby v. HLC Properties, Ltd.* (2014) 223 Cal. App. 4th 597, 608, 167 Cal. Rptr. 3d 354).

False Imprisonment

A plaintiff's cause of action, if any, for false imprisonment is complete upon his or her release from custody, even though additional damages might have occurred later (*Torres v. Department of Corrections & Rehabilitation* (2013) 217 Cal. App. 4th 844, 848, 158 Cal. Rptr. 3d 876, *citing Scannell v. County of Riverside* (1984) 152 Cal. App. 3d 596, 606, 199 Cal. Rptr. 644).

Intentionally Caused Emotional Distress

The unavailability of noneconomic damages for a termination decision substantially motivated by discrimination does not preclude the possibility of liability in tort for intentional infliction of emotional distress. Emotional distress damages also may be available when an employee is subject to unlawful harassment under the California Fair Employment and Housing Act (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 234, 152 Cal. Rptr. 3d 392).

Breach of Covenant of Good Faith and Fair Dealing

If a lender and a buyer agree between themselves to destroy the seller's interest, the seller is entitled to secure relief either

upon the ground of fraud or under the covenant of good faith and fair dealing. The absence of malevolent purpose does not itself immunize the buyer and the lender. If, however innocently, their bilateral agreement or conduct so modifies the terms of a senior loan that the risk that it will become a subject of default is materially increased, then the buyer and the lender may subject themselves to liability to the seller if they proceed without the latter's consent, and if the seller's otherwise junior loan is to be adversely affected (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal. App. 4th 602, 618, 160 Cal. Rptr. 3d 49).

In *Reid v. Mercury Ins. Co.* (2013) 220 Cal. App. 4th 262, 276, 162 Cal. Rptr. 3d 894, the court held that there is no private civil cause of action against an insurer that commits one of the various acts listed in Ins. Code § 790.03(h), although violations of the section may evidence the insurer's breach of duty to its insured under the implied covenant of good faith and fair dealing.

Attorney Malpractice

In *Wise v. DLA Piper LLP (US)* (2013) 220 Cal. App. 4th 1180, 1190, 164 Cal. Rptr. 3d 54, the court held that when a claim is alleged to have been lost by an attorney's negligence, to recover more than nominal damages it must be shown that it was a valid subsisting debt, and that the debtor was solvent. The loss of a collectible judgment by definition means the lost opportunity to collect a money judgment from a solvent defendant and is legally sufficient evidence of actual damage. A plaintiff in a malpractice action must establish that the underlying judgment lost as the result of the attorney's error could have been collected.

Punitive or Exemplary Damages

Because a sanctions order necessarily entailed finding of conduct that was precluded from insurance coverage, plaintiffs, insured and others, were not even potentially covered under policy, and insurers could have sought reimbursement for costs expended in defending against sanctions (*Wallis v. Centennial Ins. Co.* (E.D. Cal. Nov. 8, 2013) 2013 U.S. Dist. LEXIS 161304.

In *Davis v. Kiewit Pacific Co.* (2013) 220 Cal. App. 4th 358, 365, 162 Cal. Rptr. 3d 805, the court held that corporations may be held liable for punitive damages through the malicious acts or omissions of their employees, but only for the acts or omissions of those employees with sufficient discretion to determine corporate policy.

Gov. Code § 12989.2 provides that in a civil action brought under Gov. Code §§ 12981 or 12989.1, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award the plaintiff actual and punitive damages and may grant other relief, including the issuance of a temporary or permanent injunction, temporary restraining order, or other order, as it deems appropriate to prevent any defendant from engaging in or continuing to engage in an unlawful practice. In a civil action brought under this section, the court in its discretion, may award the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, against any party other than the state. If the court finds that the defendant has engaged in an unlawful practice and is liable for actual or punitive damages, any amount due to the defendant by a state agency may be offset to satisfy the court's final order or decision.

In *Pfeifer v. John Crane, Inc.* (2013) 220 Cal. App. 4th 1270, 1311, 164 Cal. Rptr. 3d 112, defendant maintained that its conduct was insufficiently reprehensible to support

a $14.5 million punitive damages award. In concluding that defendant's conduct was sufficiently reprehensible to support the amount of the award, the court of appeal found that the award was comparable in amount to awards against other defendants whose conduct in marketing dangerous products displayed a high degree of reprehensibility.

A defendant who fails to comply with a court order to produce records of his or her financial condition may be estopped from challenging a punitive damage award based on lack of evidence of financial condition to support the award (*Corenbaum v. Lampkin* (2013) 215 Cal. App. 4th 1308, 1337, 156 Cal. Rptr. 3d 347).

In an asbestos exposure case, a corporate defendant was properly ordered to produce evidence of its financial condition, even though plaintiffs did not comply with the motion procedure specified in Civil Code Section 3295(c). That procedure was rendered superfluous by the jury's finding regarding defendant's malice, oppression, or fraud (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal. App. 4th 1270, 164 Cal. Rptr. 3d 112).

Contribution and Indemnity

In *City of Bell v. Superior Court* (2013) 220 Cal. App. 4th 236, 247, 163 Cal. Rptr. 3d 90, the appellate court explained that in interpreting an express indemnity agreement, the courts look first to the words of the contract to determine the intended scope of the indemnity agreement. The intention of the parties is to be ascertained from the clear and explicit language of the contract, and if possible, from the writing alone. Unless given some special meaning by the parties, the words of a contract are to be understood in their ordinary and popular sense, focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made.

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